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IN THE

Supreme Court of the United States,

OCTOBER TERM, 1899.

No. 640 281

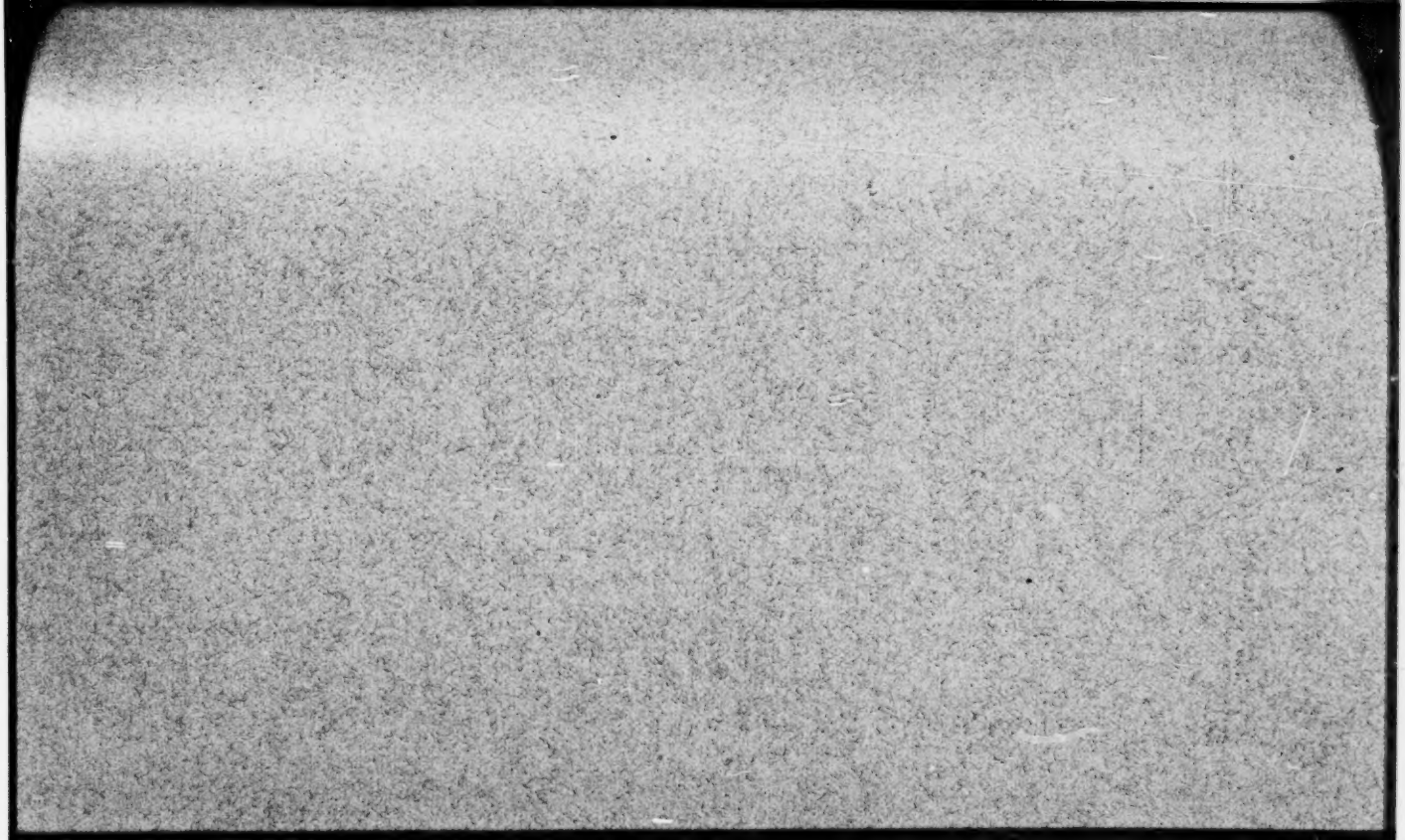
THE CITY OF NEW ORLEANS, A MUNICIPAL CORPORATION, PETITIONER,

versus

JOHN G. WARNER, JOHN CROSSLEY'S SONS, THE SUFFOLK NATIONAL BANK, FRANCIS JAMES GASQUET, WILDER & COMPANY, MRS. FRANK N. BUTLER, IN HER INDIVIDUAL CAPACITY AS WIDOW IN COMMUNITY, AND AS EXECUTRIX OF THE LAST WILL AND TESTAMENT OF FRANK N. BUTLER, HER DECEASED HUSBAND, MRS. MARY E. TALIAFERO, AND MRS. ELIZA J. LYTLE, DATIVE TUTRIX, RESPONDENTS.

Petition for writ of certiorari, requiring the United States Court of Appeals for the Fifth Circuit to certify to the Supreme Court of the United States, for its review and determination, the case of City of New Orleans, Appellant, vs. John G. Warner, et als., Appellees, No. 928 November Term, 1899.

A. W. HYATT STAT'Y MFG. CO., LTD., N. O.—83,834.



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To the Honorable the Supreme Court of the United States:

The petition of the City of New Orleans, a municipal corporation, created by the act of the General Assembly of the State of Louisiana No. 45 of its session in 1896, respectfully shows:

That complainant, Warner, on November 26, 1894, filed his bill in the Circuit Court, setting forth in substance that he was the holder and owner of three warrants on the City of New Orleans, issued under a certain contract made June 6, 1876, for the purchase from the Mississippi and Mexican Gulf Ship Canal Company, and Van Norden, its transferree, of its rights, franchises, tools, implements, machines, boats and apparatus, the price whereof was to be paid in drainage warrants, payable out of drainage taxes, imposed under various acts of the Legislature set out in the bill; that the price of the sale was three hundred thousand dollars in such warrants. The bill further set up that the said contract of purchase was made under authority of Act No. 16 of the General Assembly, of Louisiana, approved March 24, 1876, and that by the contract thereunder the City of New Orleans was to complete the system of drainage which had then been partially constructed by the said company and Van Norden, and to collect the drainage taxes which had been imposed to provide for the expense of establishing the system; that the City of New Orleans, from the date of its said purchase, ceased to do all work on said system, and never, thereafter, commenced or prosecuted any other, but sold some of the boats and machinery so purchased, diverted the proceeds of the drainage taxes to unauthorized purposes, and allowed others of the said boats to rot and sink, unused.

After charging other acts in violation of the city's contract of 1876, the bill concluded with a prayer for the taking of an account of all drainage taxes, assessments and judgments, imposed under certain named statutes, and of all moneys collected by the city on account of the same, as well as all payments, disbursements and dispositions thereof; for all loss, waste and damage caused by the city to the said assessments and judgments, by reason of her illegal and wrongful acts in violation of the duties and obligations imposed on her by said act of sale of June 6, 1876; and that the sum found to be due on said accounting, with interest, be decreed to be paid over to plaintiff, and other parties similarly situated, to the full extent of their warrants, with interest, and other germane relief.

To this bill the city filed a demurrer, general and special, under which it was claimed that she was entitled to plead, against any asserted liability on account of the warrants sued on, her issue in 1873 of $1,672,105.21 of bonds, to retire that amount of drainage warrants, on the ground that, that, if not a

discharge of any and all liability by her to the drainage fund, was at least a payment of any sum for which she, herself, might be a debtor to that fund, on account of drainage assessments against streets, squares, public places, and other property of a like character; also that the decision of the Supreme Court, in the case of James W. Peake vs. City of New Orleans, 139 U. S., p. 342, was *res adjudicata* against complainant, as to all the matters and things set out in his bill.

The demurrer was sustained by the Circuit Court, and the cause being brought to the Court of Appeals for the Fifth Circuit, by appeal, it was by that Court certified to the Supreme Court of the United States, to obtain its instructions as to the two points relied upon by the city, as above stated.

Warner vs. City of New Orleans, 167 U. S., 467, *et seq.*

The Supreme Court held, that the city could not plead her bond issue as a setoff or payment, as to any liability sought to be established by the bill; the second question it declined to answer.

See Warner vs. New Orleans, 167 U. S., 467, *et seq.*

Thereupon, after the filing of the mandate of the Supreme Court, the Court of Appeals overruled the demurrer, on the ground, besides that furnished by the Supreme Court's opinion, that the case of Peake vs. New Orleans did not necessarily apply to the facts of this case, nor operate to defeat complainant's action.

See Warner vs. New Orleans, 81 Fed. Rep., 645.

The city having filed its answer in the Circuit Court, after the taking of evidence, the cause came on for a hearing, which resulted in a decree of the Circuit Court, dismissing the bill; from this decree an appeal was taken to the Court of Appeals, by which it was reversed and one entered in favor of complainant; the case was then carried by *certiorari* to the Supreme Court of the United States, which affirmed the judgment of the Court of Appeals.

See Warner vs. New Orleans, 175 U. S., 120.

Thereupon there was a reference to a special master, for the purpose of ascertaining the amount of drainage funds for which the city was liable under the last decree, and also what other persons, besides complainant, as holders of drainage warrants, were entitled to the benefits of the decree; the master reported that the city was liable for an amount somewhat in excess of two millions of dollars of drainage taxes, composed, in

part, of assessments levied against private property, which she failed to collect, and also in part of drainage assessments levied against streets, public squares, public places, etc., of which she was found the debtor.

The master also reported that the following parties, holders of drainage warrants, of the same class and kind as those held by relator, should, in common with him, be paid the amounts represented by their said warrants, to-wit:

1st.—John Crossley & Son, 58 warrants, aggregating	$149,000 00
2nd.—Wilder & Co., 2 warrants, in judgment, aggregating	7,000 00
3rd.—F. J. Gasquet, 6 warrants, aggregating	30,000 00
4th.—The Suffolk National Bank, of Boston, 6 warrants, aggregating	60,000 00
5th.—Frank N. Butler and Mary E. Taliafero, 1 warrant, for	5,000 00
6th.—John J. Donaldson, 1 warrant, for	2,000 00
7th.—Mrs. Eliza J. Lyttle, dative tutrix, 3 warrants, for	12,000 00

Said sums to bear interest at 8 per cent. per annum from June 7, 1876.

To this report defendant filed the following exceptions:

First.—That there was error in charging defendant with liability for the whole of the uncollected assessments against private property, of property owned by private persons, because the evidence before master showed that all such taxes as could be, or were susceptible of collection, have been collected and paid over to the parties and purposes for which they were assessed.

Second.—That the advantages of the decree under which the reference is made, extended only to such warrants as were issued in payment of the property purchased by the act before G. LeGardeur, notary public, of date June 7, 1876, which said property, as shown by the inventory and appraisement of T. S. Hardee, city surveyor, amounted to $153,750, and no more; that the balance of drainage warrants issued under said act were not in payment of the price of the property thereby sold, and hence were not purchase warrants in the sense of the opinions and decrees of the Circuit Court of Appeals and of the Supreme Court herein; that such balance of said warrants were in great part issued in settlement of a claim for damages urged by the

Mississippi and Mexicana Gulf Ship Canal Company and Warner Van Norden against the City of New Orleans; that of of said warrants, besides those issued in settlement of said claim for damages, the sum of twenty thousand dollars was issued, as will appear by the express terms of the said act, in satisfaction of that amount of drainage taxes collected by the City of New Orleans, prior to June 6, 1876, and applied to general fund purposes, and hence, that as to those warrants, in any event, there could be no recovery or allowanace made; that in any event, the decree in the suit of J. W. Peake vs. City of New Orleans, No. 11,614, of the United States Circuit Court for the Eastern District of Louisiana, is *res judicata*,, in favor of this defendant.

That although there is no mark or sign upon any of the said warrants, which were issued in payment of the price of the property purchased, which were given in settlement of the claim for damages, and which were executed and delievered in payment for drainage work, which had been done, the said warrants can be so identified and distinguished, at least so as to ascertain what amounts were issued in payment of the price of the said property, and what were issued for the other two purposes named; that it must be considered that the warrants were issued and applied in the numerical order of their execution; first, for the payment of the price of the property purchased; next, to the settlement of the claim for damages, and lastly for the payment for work mentioned in said notarial act; that all of said warrants bear date June 6, 1876, the first one bearing the number 313, and run up to and inclusive of the number 402, as is shown by the statement of the said warrants themselves, offered in evidence.

That from an examination of the said warrants, and a comparison of their numbers, it will be seen that with the issuance of warrant No. 332 there had been reached an issue of $150,000, adding to which warrant 333 for $5,000, would make a total issue of $155,000, or a difference of $1,250 in excess of the amount intended and authorized to be issued for the payment of the price of said property.

After hearing, these exceptions were overruled and a final decree entered, declaring the city a debtor to the drainage fund in the sum of $1,850,336.52, this being the amount, with interest, of the assessments against public property alone, no note being taken in the decree of the amount for which the master's

report had found a liability for the assessments on private property; drainage warrants held by complainant, and other intervening warrant holders, to the extent of $271,000, with interest thereon at 6 per cent, per annum, from June 6, 1876, amounting in all to about $791,000, were decreed to be payable out of the fund so established.

From this decree the city took an appeal to the Court of Appeals.

The assignment of errors for said appeal, sets up the same grounds appearing in the exceptions to the master's report.

The first one sets out that the Court erred in overruling, and refusing to sustain the exceptions; that the same should have been maintained, and that there should have been a decree in favor of respondent; the other six assignments, set out in detail, the specific errors in the Court's finding, and the special grounds relied upon for a reversal.

That on April 30th, 1900, the said Court of Appeals, for the Fifth Circuit, entered a decree, affirming that of the Circuit Court, for the reasons that all the issues raised in the Circuit Court, and upon the appeal from its decree, had been decided and foreclosed against the City of New Orleans by the Supreme Court of the United States, by its decree in Warner vs. City of New Orleans, 167 U. S., p. 467, and City of New Orleans vs. Warner, 175 U. S., p. 120.

That in the said Circuit Court, at the same time that petitioner applied for and obtained its order of appeal, it filed, in connection with its motion therefore, the following assignment of errors:

First.—That the Court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this Court on the —— day of March, 1900; that the Court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second.—That from the evidence before the Court, accompanying the said report, it conclusively appeared that the dredge boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. LeGardeur, Jr., notary public, of date June 7th, 1876, were of the value of

$153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment out of, or participation in, the said fund, because they were in no sense purchase warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third.—That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the City of New Orleans to other than drainage fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of the Court of Appeals, or of the Supreme Court of the United States, in this cause, that the Circuit Court erred in admitting them to any participation in the fund ascertained by the master to be due by the City of New Orleans, or to their payment out of the same.

Fourth.—That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the City of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge boats, etc., and $20,000.00, in satisfaction of drainage taxes claimed to have been diverted, to-wit: $146,250.00, they were issued without any warrant or authority of law, the said act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants

may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work, by the City of New Orleans, required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the Court should have refused the allowance of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city were decreed to be payable out of the said funds, save $4,000.00 thereof, which has been paid, in which finding the Court was in error.

Fifth.—That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth.—That the Court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the Court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh.—That the Court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees of this cause, made and entered by this Court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been con-

sidered by this Court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either Court; that the Circuit Court erred in so holding, and should have held the reverse.

That petitioner also incorporated the said assignments of error in its application for a rehearing made herein to the said Circuit Court of Appeals.

That in the opinion and decree of the said Circuit Court of Appeals there was error to the prejudice of petitioner in the following particulars, to-wit:

First.—That the grounds of exception to the master's report filed by petitioner in the Circuit Court, and the issues raised by such exceptions, had not been decided adversely to the City of New Orleans, or foreclosed against her, in Warner vs. New Orleans, 167 U. S., p. 467, and New Orleans vs. Warner, 175 U. S., p. 120; and that the Court of Appeals erred in holding the reverse that, on the contrary, no such questions were raised, much less decided, in the case first mentioned, and that in the cause secondly mentioned, although some of the issues presented by said exceptions were urged upon the Court, the latter, by its opinion, expressly declined to consider them; and, further, the precise issues presented herein were not made, much less passed upon, by the Supreme Court, in the case secondly mentioned.

Second.—That the principle declared by the two said cases was that the drainage warrants in question here, so far as issued in payment of the price of property, were obligations of the City of New Orleans; that the Supreme Court did not decide, in either of said cases, that warrants issued in settlement of, or attributable to, the payment of any claim for damages held by the Mississippi and Mexican Gulf Ship Canal Company or Warner Van Norden against the City of New Orleans, were obligations of the latter, or entitled to the same rights and privileges as warrants issued in payment of the price of property; that the Court of Appeals for the Fifth Circuit erred in not so holding, and also in holding as it did.

Third.—That no warrants should be considered as having been issued in payment of the price of the franchise of the said company, as the same was of no value to the City of New Orleans, and its acquisition by the latter gave it nothing of any value, but was, on the contrary, the assumption by it of an onerous burden, to-wit: the completion of the drainage work at

its own expense, for which work the company and Van Norden were entitled to charge fifty cents per square yard for canal excavation and levee building, which charges, however, they had never been able to collect, except in an insignificant amount, thus throwing upon the company and Van Norden the loss of many hundreds of thousands of dollars; thus relieving them of a burdensome and unprofitable duty, and the Court of Appeals erred in holding that the contrary held by the Supreme Court, as that the said franchise was to be considered, as in part, a consideration for any of said warrants.

Fourth.—That the item of twenty thousand dollars of drainage warrants, issued in settlement of the amount of drainage taxes said to have been diverted or used by the City of New Orleans for purposes other than the retirement of drainage warrants, prior to June 7th, 1876, the date of the city's purchase, was in reality entirely beyond the authority given the city by Act No. 16 of 1876, and the substitution of so many so called "purchase" warrants for a corresponding amount of warrants issued to Van Norden and the said company, in payment for work done, which latter class of warrants it was decreed that the city could not be compelled to pay, in the case of J. W. Peake vs. City of New Orleans, No. — of the docket of this Court of its October term of 1890.

Fifth.—That the said Court erred in not sustaining the assignment of errors upon which the reversal of the decree of the Circuit Court was asked, which said assignment of errors was as follows, to-wit:

First.—That the Court erred in overruling and refusing to sustain the exceptions of respondent to the report of the Honorable A. G. Brice, special master, filed in this Court on the — day of Mrch, 1900; that the Court should have maintained such exceptions to the report, and have entered a decree in favor of the respondent.

Second.—That from the evidence before the Court, accompanying the said report, it conclusively appeared that the dredge boats, derricks, etc., and other tangible property, or property having a physical existence, purchased by the City of New Orleans from Warner Van Norden and the Mexican Gulf and Ship Canal Company, by authentic act before G. LeGardeur, Jr., notary public, of date June 7th, 1876, were of the value of $153,750.00, under the appraisement made pursuant to the act of the General Assembly of Louisiana, No. 16 of 1876, and that

to this extent only, and to no further or larger amount, should the warrants issued under the city's purchase of June 7th, 1876, be admitted as debts or liabilities of the City of New Orleans, and payable out of the fund ascertained by the master's report; that any warrants in excess of this amount should have been refused payment of, or participation in, the said fund, because they were in no sense "purchase" warrants, were not given in payment of the purchase price of property, and hence, not entitled to the benefits of the decree in this cause.

Third.—That as to the $20,000.00 of purchase warrants issued in satisfaction of certain collections of drainage funds claimed to have been applied by the City of New Orleans to other than drainage fund purposes, there was no warrant or authority, in law or otherwise, for their issuance; that they were in no sense "purchase warrants," or warrants issued in payment of the price of anything, in the sense of the findings of this Court, or of the Supreme Court of the United States, in this cause; that the Circuit Court erred in admitting them to any participation in the fund ascertained by the master to be due by the City of New Orleans, or to their payment out of the same.

Fourth.—That as to the remainder of the $320,000.00 issued, as shown by the said act of sale from Van Norden and said company to the City of New Orleans, that is, the residue after deducting the said $153,750.00, the value of the dredge boats, etc., and $20,000.00, in satisfaction of drainage taxes claimed to have been diverted, to-wit: $146,250.00, they were issued without any warrant or authority of law, the said Act No. 16 of 1876 furnishing no authority for the same; that they represented no value received by the City of New Orleans, and were a mere gratuity; that so far as the said residue of the said warrants may have been, or pretended to have been, in settlement of any claim for damages due by respondent to Warner Van Norden, or the said company, it was without warrant or authority of law, the said act of 1876 neither directing nor authorizing any settlement or compromise of any such claim; and that even were it otherwise, there was no appraisement of the said damages, which, in any event, would be a condition precedent, under said act of 1876, for any settlement or adjustment thereof; that so far as the said residue of the said warrants may have been, or may have been pretended to have been, in payment of the price of or equivalent for the franchises of the said company, the same was a pure fiction, and that the assumption of said franchises by

respondent was not the acquisition of property, or of anything of value, but was the assumption of a burden or obligation, the franchise of the company being to dig canals and to build levees, and to charge therefor at the rate of fifty cents per square yard for each class of work, while the assumption of this work by the City of New Orleans required it to expend its own means in the prosecution thereof, without the right to make any charge therefor against any person; that, in any event, no contract could have been made for the purchase of said franchise, except at a price fixed by an appraisement, under the act of 1876, prior to its purchase, and no such appraisement was made.

That the Court should have refused the allowonce of the said residue of warrants against the fund ascertained to be due by respondent, and should have rejected any claim against the same evidenced by warrants, in excess of the said $153,750.00, while, as a matter of fact, the whole amount of the $320,000.00 of warrants issued by the city were decreed to be payable out of the said funds, save $4,000.00 thereof, which had been paid, in which finding the Court was in error.

Fifth.—That warrants to the extent only of $153,750.00 should have been admitted as due by the city out of the said fund, and to be paid therefrom; that the particular warrants entitled to such right could be ascertained by taking the warrants in the numerical order of their issuance, since it should be assumed that the parties would first proceed to do what was lawful under the act of 1876, and afterwards to have done what there was no right to do.

Sixth.—That the Court, refusing to separate the valid from the illegal warrants, dealt with the entire issue as a unit, in which there was error; that the Court should have rendered a judgment excluding from participation in the fund all warrants in excess of $153,750.00, ascertained as aforesaid.

Seventh.—That the Court erred in holding that all questions raised by the exceptions to the master's report were foreclosed, or decided, adversely to respondent, in the prior decrees in this cause, made and entered by this Court and by the Supreme Court of the United States; that the grounds of the said exceptions, and the issues raised by the latter, had never been considered by his Court or by the Supreme Court of the United States, and hence, had not been decided or passed upon at all by either Court; that the Circuit Court erred in so holding, and should have held the reverse.

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Your petitioner thus respectfully submits that the questions involved in the determination of the controversy in this suit, are of such gravity and importance, and their treatment by the Court of Appeals was such, as justifies petitioner, in the furtherance of justice, to invoke the power of this Court, that they may be authoritatively and finally adjudged upon, after a full presentation of the merits.

Wherefore, petitioner respectfully prays that a writ of *certiorari* may be issued out of and under the seal of this Honorable Court, directed to the United States Circuit Court of Appeals for the Fifth Circuit, commanding the said Court to certify and send to this Court, on a day certain, to be therein designated, a full and complete transcript of the record, and all the proceedings of the said Circuit Court of Appeals, in said case, therein entitled City of New Orleans vs. John G. Warner, *et als.*, No. 928, to the end that said case may be reviewed and determined by this Court, as provided by Section 6 of the Act of Congress entitled, "An act to establish Circuit Courts of Appeals, and to define and regulate, in certain cases, the jurisdiction of the Courts of the United States, and for other purposes," approved March 3rd, 1891, or that your petitioner may have such other or further relief or remedy in the premises as to this Court may seem appropriate and in conformity with the said act, and that the said decree of the said Circuit Court of Appeals in said suit, and every part thereof, may be reversed by this Honorable Court.

And your petitioner will ever pray, etc.

United States of America,
State of Louisiana,
City of New Orleans.

Paul Capdievielle, being duly sworn, deposes and says: That he is the Mayor of the City of New Orleans, plaintiff in the suit of City of New Orleans vs. John G. Warner, *et als.*, No. 928 of the docket of the United States Circuit Court of Appeals for the Fifth Circuit; that he has read the foregoing petition, and the facts therein stated are true to the best of his knowledge and belief.

United States of America,
State of Louisiana,
City of New Orleans.

Samuel L. Gilmore, being duly sworn, deposes and says: That he is City Attorney of the City of New Orleans; that as such he had personal charge for the said city of the case in the foregoing petition mentioned, in the United States Circuit Court of Appeals, for the Fifth Circuit; that he has read the said petition, by him subscribed, and the facts therein stated are true, to the best of his knowledge and belief.